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David Bordelon
Louisiana Board of Governmental Ethics
P.O. Box 4368
Baton Rouge, LA 70821

Re: Request for Advisory Opinion

Dear David:

Entergy Louisiana, LLC, Exxon Mobil Corporation, and Georgia-Pacific Port Hudson, LLC ("Requestors") through undersigned counsel, respectfully request an Advisory Opinion regarding the application of the Louisiana Code of Governmental Ethics (Ethics Code), based on the following facts:

I. Background Facts

The Capital Area Groundwater Conservation District ("CAGWCC") was created by the Louisiana Legislature through Act 678 of 1974 to provide for the efficient administration, conservation, orderly development and supplementation of groundwater resources in the parishes of East Baton Rouge, East Feliciana, Pointe Coupee, West Baton Rouge and West Feliciana.¹ The District's governing commission began work in January 1975.

CAGWCC's enabling legislation is found at La. R.S. 38:3071 *et seq.* The Board of Commissioners of the CAGWCC has eighteen members three of which are nominated by industrial users.

On December 1, 2021, the CAGWCC sent a Memo to "Industrial Water Users" stating that "[i]f your company desires to nominate an individual to serve on the Board of Commissioners, please submit a letter of nomination...."

Entergy, Exxon Mobil, and Georgia-Pacific are industrial users of groundwater and pursuant to the CAGWCC's enabling legislation, the CAGWCC bills Exxon Mobil, Georgia-Pacific and Entergy quarterly for the gallons of water pumped within the preceding three months.

At times in the 47 year history of the CAGWCC, Requestors, as well as other industrial users, have been contacted for suggested nominations of industrial members to the Board. Entergy, Exxon Mobil, and Georgia-Pacific have employees who are uniquely qualified through

¹ The Commission was expanded to include Iberville Parish.

their years of experience in the area of groundwater preservation and whose service on the Board of Commissioners of the CAGWCC would benefit the public.

II. Request for Advisory Opinion

Can employees of industrial users serve on the Board of Commissioners of the CAGWCC while receiving remuneration from the industrial user without violating the provisions of the Ethics Code when the statute defining the composition of the Commission specifically requires that the Commission include three members that represent industrial users and predates the current version of the Ethics Code?

III. Proposed Advisory Opinion

CAGWCC's enabling legislation is found at La. R.S. 38:3071 *et seq.* The Board of Commissioners of the CAGWCC has eighteen members three of whom are nominated by industrial users. The Board of Commissioners of the CAGWCC is statutorily required to be composed of industrial groundwater users that reside in the district. The enabling legislation defining the composition of the Board of Commissioners was enacted in 1974 prior to the current version of the Ethics Code that applies to appointed members of boards and commissions which was not enacted until 1979 with an effective date of January 1, 1980.

The legislature specifically provided that three members were to be nominated by industrial users within CAGWCC's jurisdiction. This eighteen-member board ensures that all groundwater users – including the industrial users – have a position on the board and a voice on those issues that may have an impact on all groundwater users equally. Additionally, employees of the industrial users have knowledge and expertise in water management which benefits the CAGWCC and the public. Employees of industrial users have served as commissioners, following Governor appointment and Senate confirmation, on the CAGWCC for decades.

The Court of Appeal, First Circuit, the court of original appellate jurisdiction of decisions of the Ethics Board, has held that the Ethics Board does not have the power to change an act passed by the legislature and, thus, may not change the qualifications of the members of a state board. In *Louisiana Milk Commission v. Louisiana Comm'n on Governmental Ethics*, 298 So. 2d 285 (La. Ct. App. 1974), the First Circuit held that the Commission on Governmental Ethics [the predecessor to the current Ethics Board] “acted *ultra vires*” in determining that members of the Milk Commission who were producers, handlers, retailers or otherwise engage in the dairy industry, albeit statutorily qualified, were in violation of the Ethics Code and were required to either resign or divest themselves of any economic interest in the dairy industry. Moreover, the First Circuit found that there was an “**irreconcilable conflict** between legislative expressions.” at p. 289. [Emphasis added].

Additionally, in *Hill v. Commission on Ethics for Public Employees*, 453 So.2d 558, (La. 1984), the Louisiana Supreme Court analyzed whether a person who is a licensed cosmetologist or shop owner could serve on the Board of Cosmetology. In that case, the Supreme Court found that the statute in requiring that a board member “‘shall have been’ actively engaged for at least five years prior to their appointment as a cosmetologist or teacher” implied that practitioners

were to serve on the board. *Id.* at 562. Additionally, the court cited with approval Judge Sartain's concurrence in the *Milk Commission* case:

'It is my belief that the principal reason why the Legislature decreed that three members of the Commission are required to be milk processors and one member a milk producer is that the Legislature deemed that these appointees would be possessed of certain expertise in the handling and production of milk. This does not, per se, create a conflict of interest.'

Id. (quoting, *Louisiana Milk Commission v. Louisiana Commission on Governmental Ethics*, 298 So.2d 285, 291 (La. App. 4 Cir.1974)).

The issue here is the same as that presented in *Milk Commission*, the Legislature has designed the composition of the Board of Commissioners of the CAGWCC to ensure that industrial users and their interests are represented. And, as the Court concluded in *Milk Commission*, the Ethics Board does not have the authority to interpret its provisions in a manner that seeks to prohibit industrial users from having its representatives serve on the Board of Commissioners of the CAGWCC. As the Supreme Court acknowledged in *Hill*, the rationale behind these statutory constructs is to have expertise represented on the Board. In both instances, the Boards predate the Ethics Code, and their purpose would be frustrated by applying the Ethics Code in such a narrow manner that employees of appointers, who possess the expertise necessary to assist the Board, would be barred from service.

Additionally, La. R.S. 42:1111C(2)(d) does not prohibit an industrial user employee from serving as a commissioner on the CAGWCC when the only relationship between the industrial user and the CAGWCC is the industrial user's payment of usage fees to the CAGWCC.

La. R.S. 42:1111C(2)(d) prohibits an appointed member of a board or commission from receiving any thing of economic value from a person which has a contractual, business or financial relationship with the board on which the member serves or from any person whose activities are regulated by the CAGWCC.

CAGWCC's enabling legislation is found at La. R.S. 38:3071 *et seq.* Section 3076 outlines the Powers of the Board and provides:

A(14) To assess against **all users** within the district a charge based upon the annual rate of use of each user sufficient to meet costs and expenses of operation.

The only existing "relationship" or "regulatory" activity between industrial users and the CAGWCC is that of an industrial entity doing what it, and any other user, is statutorily-required to do – pay assessed charges. Thus, industrial users have the same relationship with the CAGWCC as any other "user", including residential users, in the six-parish area that is required to pay, either directly or indirectly through a public or private water company, for the water the "user" consumes each month.

In *Louisiana Bd. of Ethics v. Randolph*, 2013-1509 (La. App. 1 Cir. 8/21/14), writ denied, 2014-1987 (La. 11/21/14), 160 So. 3d 974, the Court of Appeal, First Circuit concluded that no contractual, business, or financial relationship as contemplated by La. R.S. 42:1111(C)(2)(d) and 42:1115(A)(1) existed between BP and Terrebonne Parish because the Agreement "imposed no obligations or duties upon the Parish other than those imposed upon it irrespective of the Agreement." Payment of bills for the use of groundwater does not rise to the level of a contractual, business or financial relationship between industrial users and the CAGWCC as contemplated by La. R.S. 42:1111C(2)(d). Thus, using the rationale from *Randolph*, when each industrial user's "financial or regulatory relationship" with the CAGWCC is the same as all "users" "irrespective" of the "relationship," then there is similar regulation by the CAGWCC, and the industrial users are not prohibited sources of income to industrial user employees who serve as CAGWCC commissioners.

IV. Conclusion

Based on the foregoing, we request that the Ethics Board issue an advisory opinion at its next meeting concluding that employees of industrial users are not prohibited under the Ethics Code from serving on the Board of Commissioners of the CAGWCC when the statute defining the composition of the Commission specifically requires that the Commission include three members that represent industrial users.

Yours truly,

R. Gray Sexton